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In the Supreme Court of the United States

OCTOBER TERM, 1978

FRUEHAUF CORPORATION, WILLIAM E. GRACE and ROBERT ROWAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY MEMORANDUM

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In its "Statement" the government has made two serious misstatements which petitioners believe must be corrected so as not to prejudice their case before the Court. The first misstatement appears on page 7 of the Brief in Opposition:

> "The implementation of the Hobbs method by Fruehauf resulted in the maintenance of a double set of invoices for each trailer sold to a distributor. This double invoicing had the effect of misleading the Internal Revenue Service as to the true nature and treatment of Fruehauf's handling charge (Pet. App. 21)."

The citation (Pet. App. 21) is to a portion of the opinion of the court of appeals where it is stated that the copy of the invoice sent to the distributor showed the list price less the discount, whereas another copy showed an $83.00 reduction in the list price which reflected the exclusion of the handling charge from the excise tax base. There is no intimation by the court of appeals, nor was there by the district court, that this misled the Internal Revenue Service.

Fruehauf equipment invoices came in packets of nine copies each. Each copy within the packet was consecutively numbered from 1 to 9 and its use and disposition was designated in the lower left hand corner (IV R. 300-309). On sales to distributors each packet of invoices was numbered sequentially with numbers taken from an invoice register (I R. 293; 298). Since the excise tax was required to be separately computed on each sale, it was actually computed on the face of the copy of the invoice that was sent to the accounting department (II R. 549 & 618). Examples were admitted in evidence as Defense Exhibits 53 through 62 for sales to distributors for the period 1956 through 1965 (II R. 619-622). One copy of the invoice was maintained in a sequential file, and the copy upon which the tax computation was made (showing the $83 reduction in list price for the handling charge) was filed with the sales order (II R. 822 & 972). An Internal Revenue Service auditor would be shown both copies. He would need the sequential copy to account for all sales and the accounting copy to verify the tax computation (II R. 820-822). Thus, there was nothing misleading about this system of invoicing and record-keeping, and neither of the courts below held the system to be misleading.

The second misstatement appears on page 10 of the Brief in Opposition:

> "Like the supplemental charge plan, the tire tax credit scheme involved dual invoicing."

There is no citation to the record to support this allegation. The practice at issue was the computation of tire tax credit based on the invoiced price of tires without taking into consideration subsequently received cash rebates or credit memoranda. There was never even a suggestion, much less any evidence, that tire manufacturers sent Fruehauf two invoices for the same tires.

On page 22 of its Brief in Opposition, the government has incorrectly referred to petitioners' argument that they are entitled to offset proven overpayments of tax against alleged deficiencies in tax on the same return, as one based upon "after-the-fact events." This would liken it to a carryback loss which arises subsequent to the filing of an income tax return and from different transactions. Such is not the fact in the instant case. As stated on page 24 of the Petition for Certiorari, what was involved were overpayments of tax "which existed at the time the returns were filed."

During the entire period covered by the indictment, Fruehauf sold trailers which were mechanically refrigerated by units commonly referred to as "Thermo Kings". It also sold these units separate and apart from trailers. Fruehauf computed and paid an excise tax on these sales during the entire indictment period. (II R. 743-746; 921.) In 1965, the Court of Claims held that the excise tax on commercial refrigeration units, including those installed in trucks and trailers, had been repealed by §614 of the Revenue Act of 1942. *Thermo King Corporation* v. *United States,* 354 F.2d 242, 244 (Ct. Cls., 1965). The court further

held that such refrigeration units were not subject to excise tax as automotive parts and accessories. The Court of Claims again reached this same decision in *United States Thermo Control Co.* v. *United States* and *Thermo King Corporation* v. *United States,* 372 F.2d 964 (1967), *cert. den.* 88 S.Ct. 68 (1967), despite the government's attempt to prove, through the use of private letter rulings, that it had been the consistent policy of the Internal Revenue Service to tax Thermo King units as automotive parts and accessories. As a result of this litigation,[1] Fruehauf filed claims for refund which were approved by the Internal Revenue Service. (II R. 744; 746-748.) It is these overpayments of excise tax which petitioners argue they have a right to offset against alleged tax deficiencies on the identical tax returns.

Respectfully submitted,

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[1] In footnote 9, page 22 of its Brief in Opposition, the government has mistakenly stated that credits resulting from the overpayments arose as a result of administrative action on the part of the Internal Revenue Service in 1968.